SUPREME COURT, U. S.

FILED

DEC 1 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 790

BRASWELL MOTOR FREIGHT LINES, INC., AND CLARINDA K. SHAYLER, INDIVIDUALLY, AND AS EXECUTRIX AND SOLE DEVISEE OF THE ESTATE OF WARREN G. SHAYLER, DECEASED,

Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, PACIFIC INTERMOUNTAIN EXPRESS CO., DC INTERNATIONAL, INC., WATSON-WILSON TRANSPORTATION SYSTEM, INC., RINGSBY TRUCK LINES, INC., IML FREIGHT, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, ILLINOIS-CALIFORNIA EXPRESS, INC. AND TRANSCON LINES,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

MOTION TO AFFIRM.

DAVID AXELROD,
ARNOLD L. BURKE,
39 South LaSalle Street,
Chicago, Illinois 60603,
CEntral 6-9375,

Counsel on behalf of Appellees, Pacific Intermountain Express Co., DC International, Inc., Watson-Wilson Transportation System, Inc., Ringsby Truck Lines, Inc., IML Freight, Inc., Consolidated Freightways Corporation of Delaware, and Illinois-California Express, Inc.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
I. Statement	2
II. Question Presented	4
III. Argument	5
IV. Conclusion	12

Cases Cited.

Alabama Great So. R. R. v. U. S., 340 U. S. 216 (1951)	10
Chicago & I. I. RR. v. U. S., 107 F. Supp. 118 affirmed 344 U. S. 917 (1953)	10
Great Coastal Express, Inc. v. U. S., 243 F. Supp. 943 affirmed 382 U. S. 369 (1966)	9
Houff Transfer v. U. S., 105 F. Supp. 851 (1952)	9
Jaffke v. Dunham, 352 U. S. 280 (1957)	10
Key et al. v. U. S. (1966)	11
Luckenbach S. S. Co. U. S., 122 F. Supp. 824, affirmed, 347 U. S. 984 (1954)	10
Pope-Purchase Hill & Burdick, 90 M. C. C. 70	9
Shein v. U. S., 102 F. Supp. 320, affirmed 343 U. S. 944 (1952)	9
U. S. v. Pierce Auto Freight Lines, Inc., 327 U. S. 515, 534-536 (1946)	10
U. S. v. Rose, 346 F. 2d 985 (1965)	10
Yemish v. Barber, 232 F. 2d 939 (C. A. 9; 1956)	10

Statutes Cited.

Section 8(b) Administrative Procedure Act (5 U. S. C. 1007(b))	7, 8, 9
Section 5(2) Interstate Commerce Act (49 U. S. C. 5(2))	7, 8, 9
Section 207 Interstate Commerce Act (49 U. S. C. 307)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 790.

BRASWELL MOTOR FREIGHT LINES, INC., AND CLARINDA K. SHAYLER, INDIVIDUALLY, AND AS EXECUTRIX AND SOLE DEVISEE OF THE ESTATE OF WARREN G. SHAYLER, DECEASED,

Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, PACIFIC INTERMOUNTAIN EXPRESS CO., DC INTERNATIONAL, INC., WATSON-WILSON TRANSPORTATION SYSTEM, INC., RINGSBY TRUCK LINES, INC., IML FREIGHT, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, ILLINOIS-CALIFORNIA EXPRESS, INC. AND TRANSCON LINES,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

MOTION TO AFFIRM

On Behalf of Appellees, Pacific Intermountain Express Co., DC International, Inc., Watson-Wilson Transportation System, Inc., Ringsby Truck Lines, Inc., IML Freight, Inc., Consolidated Freightways Corporation of Delaware, and Illinois-California Express, Inc.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to need further argument.

I. STATEMENT.

Appellants in their Jurisdictional Statement have set forth the citations to the opinion below and the statutes which provide for appeals from decisions of the Interstate Commerce Commission to statutory three-judge District Courts and thereafter to the United States Supreme Court. Appellants have also set forth the various statutes applicable in the instant matter.

Appellant Braswell operates as a motor common carrier transporting general commodities over regular routes extending between Oklahoma City and Tulsa, Oklahoma; Memphis, Tennessee and New Orleans, Louisiana, on the east, and Los Angeles, California on the west, serving innumerable intermediate points such as Jackson, Natchez and Vicksburg, Mississippi; Baton Rouge, Monroe and Shrevesport, Louisiana; Dallas, Fort Worth, Houston, San Antonio and El Paso, Texas; and Phoenix, Tucson and Yuma, Arizona. Shayler, which Braswell is seeking authority to acquire, holds authority to transport general commodities over a number of regular and irregular routes between Oklahoma City and points in Oklahoma within 125 miles of Oklahoma City, on the one hand, and, points in Illinois (including Chicago), Indiana, and certain Missouri points (including St. Louis), on the other.

By acquiring Shayler and adding the Shayler operating authority to its own in the name of Braswell, Braswell, among other things, sought to create a new single-line carrier between points in California, and points in Arizona on the west (via Oklahoma City), to points in Indiana and Illinois, on the east. The combination of the involved operating authorities also granted to Braswell single-line

authority between Texas points, for example, and points served by Shayler in Illinois and Indiana, not here in issue.

Appellees herein took the position at the various hearings before the Interstate Commerce Commission and during the proceeding before the District Court that neither Shayler, the vendor, nor Braswell, the vendee, had ever participated in traffic moving between points in Arizona and California, on the one hand, and the Shayler points, such as Chicago and St. Louis, on the other. The Commission, and subsequently the District Court, sustained this position with the result that a restriction was imposed upon the granting of the authority to purchase sought by Braswell which precludes Braswell from performing single-line service between Arizona and California, on the one hand, and the Shayler territory, on the other.

II. QUESTION PRESENTED.

The sole question presented by appellants is whether the Commission's restriction prohibiting Braswell from instituting a new single-line service between Arizona and California, on the one hand, and Illinois, Indiana and Missouri, on the other, is in accordance with applicable principles of law, as set forth in prior decisions of the Commission and the Courts.

III. ARGUMENT.

The decision of the District Court is plainly correct. The Commission, various District Courts, and this Court have very often enunciated and applied the principles of law which have been applied in this case. In reviewing the findings of the Commission which sustain the imposition of the restriction complained of, we shall also be answering appellants' allegations that the Commission failed to make requisite findings.

The Commission found that neither the vendor nor vendee had participated in traffic between Arizona and California, on the one hand, and the Shayler points, on the other. Referring to one exhibit introduced at the proceeding, the Commission stated that it:

> "Covers over 6,000 shipments, shows that vendor handled only 13 shipments which originated at, or were received from connecting carriers at Chicago, Oklahoma City or St. Louis, having origins or destinations in Arizona or California. Of these, three shipments, with an aggregate weight of 14,394 pounds were destined to California points, 9 shipments with an aggregate weight of 2,982 were originated in California, and one shipment weighing 315 pounds was originated at Tucson, Arizona" (Jurisdictional Statement B-22—B-23).

Referring to still another exhibit, ostensibly depicting traffic interchanged between appellants, the Commission found:

> "A single shipment weighing 357 pounds was destined to California, 4 shipments with a combined weight of 1,397 pounds originated at Tucson, 6 shipments with a combined weight of 1,212 pounds originated at Phoenix, and 10 shipments with a combined weight of

3,285 pounds originated at California points" (Jurisdictional Statement B-23).

Taking cognizance of vendor's interchange of traffic preceding the temporary authority during May, June and July of 1962, the Commission notes "None of this traffic was originated at or destined to points in Arizona or California" (Jurisdictional Statement B-24). Thereafter the Commission found:

> "Evidence of the scope of vendor's operations in connection with traffic interlined from and to Arizona and California points indicates *that such traffic constituted an infinitesimal part of vendor's total operations and was of no competitive significance to protestants or other carriers in the area*" (Jurisdictional Statement B-26).

Based on these basic findings, the Commission properly concluded:

> "It is clear, on the evidence before us, that service proposed by vendee from and to points in Arizona and California would constitute a new service not heretofore performed by vendor in conjunction with vendee or any other carrier. In the absence of evidence of the inadequacy of existing services, or of a showing of need for the service proposed, protestants are entitled to protection from establishment of additional competition" (Jurisdictional Statement B-26).

Appellants in their Jurisdictional Statement, never dispute these basic findings which correctly resulted in the Commission's conclusion that neither vendor nor vendee prior to the instant transaction participated in the handling of traffic between Arizona and California, on the one hand, and the Shayler territory (Indiana, Illinois and Missouri), on the other. Appellants instead urge that they should be allowed to institute a new service between said points merely because some of the carriers which serve between the involved areas are operating at a profit.

In this connection, appellants argue that the Commission committed error in refusing to take notice of all of the operating ratios of opposing carriers. Obviously, such evidence is not determinative of the issues involved, and moreover, the mere fact that a carrier is operating profitably throughout its system does not in any way justify a finding or conclusion that its operations between the points involved in the instant matter are profitable. Thus the evidence, even if admitted, would not prove what appellants sought to prove, namely that existing carriers were operating profitably between the involved points.

Having found that appellants proposed a new service, the Commission in accordance with applicable principles of law, turned to the issue of whether there was a public need for such service so that authorizing the institution of such service would be in the public interest. Since appellants offered virtually no evidence of a need for service between Arizona and California, and the Shayler territory, the Commission concluded that there was no such need and that the public interest would therefore not be served by instituting this new service.

In stating *the first two questions presented,* appellants have attempted to turn the issue around and have this Court hold that the Commission should have required opposing carriers to assume the burden of establishing that the instant transaction was not in the public interest. Section 5(2) of the Act clearly provides that the proponents of a transaction must establish that it is in the public interest. The Commission did not therefore misapply Section 5(2) nor did it fail to make adequate findings in accordance with the requirements of the Administrative Procedure Act, 5 U. S. C. 1007 (b).

In the third question presented, appellants attempt to convince the Court that the proposed service between Ari-

zona and California and the Shayler territory "is an improvement of an existing service." The findings of the Commission clearly refute this and demonstrate in further answer to question No. 3 that there would be no compensatory public benefits by the institution of a new service.

Answering Question No. 4 propounded by the appellants, the Interstate Commerce Commission and the District Court did not ignore the statutory standards set forth in Section 5(2) of the Interstate Commerce Act or Section 8(b) of the Administrative Procedures Act (5 U. S. C. 1007(b)); and neither the District Court nor the Commission were misled into believing that the proposed service between Arizona and California, and the Shayler territory was merely an improvement of an existing service with public benefits. The explicit findings, in accordance with the Administrative Procedure Act, and based upon the record are exactly to the contrary. That service would be entirely new and there was no evidence of record to substantiate an assertion that it would have any compensatory public benefit.

In Question No. 5 the appellants raise the issue of whether the Commission erred in refusing to take official notice of certain financial statements filed by these appellees and other opposing carriers. The implication in this question and in the argument in support of it being that these financial statements show that operating revenue from their entire operations would somehow be determinative of the issue of whether the new service instituted by appellants would have an adverse effect upon competitors. The argument propounded in support of this issue is so illogical that it does not require consideration by this Court. By taking official notice of the operating revenues and operating ratios of all of these appellees and others, the Commission could make no finding concerning the adverse effect of appellants' new service between Arizona-

California and the Shayler territory. Instead, the Commission looked to the evidence of record indicating that these appellees and other opposing carriers were transporting the traffic in question prior to the time Braswell obtained temporary authority to operate Shayler, and that thereafter a substantial portion of the traffic, indeed a "startling" amount of traffic had been diverted to appellants. Since the evidence set forth in Appendix E could have no affect upon the findings of the Commission, there was no error in refusing to admit it. This was offered to the Commission after the close of the hearing without any satisfactory reason being offered for the late tender.

The general principles of law applicable when one carrier purchases another and seeks, among other things, to institute a new service at least in part, have been discussed by the Commission and the Courts on innumerable occasions. The Interstate Commerce Commission has consistently refused to approve the purchase of a motor carrier's operating rights under Section 5(2) of the Interstate Commerce Act where a new service would result, in the absence of a showing similar to that required under Section 207 of the Act, that there is a public need for such service and that therefore approval is in the public interest. That application of the law has been approved on innumerable occasions by Federal Courts. *Shein* v. *U. S.*, 102 F. Supp. 320 affirmed 343 U. S. 944 (1952); *Great Coastal Express, Inc.* v. *U. S.*, 243 F. Supp. 943, affirmed 382 U. S. 369 (1966); *Houff Transfer* v. *U. S.*, 105 F. Supp. 851 (1952). See also as an example of an Interstate Commerce Commission decision, other than the ones at hand, *Pope—Purchase Hill & Burdick*, 90 M. C. C. 70.

Section 8(b) (5 U. S. C. Sec. 1007(b)) of the Administrative Procedure Act does require that the Commission make a written report setting out its findings, conclusions and decision together with reasons therefor. There is no require-

ment, however, that the Commission make the detailed findings of fact required by Rule 52(a) of the Federal Rules of Civil Procedure. See *Chicago & I. I. RR.* v. *U. S.*, 107 F. Supp. 118, affirmed 344 U. S. 917 (1953). If the Commission's report contains subsidiary findings of fact sufficient to lend adequate and rational support to its order, the Court will uphold the Commission's conclusions. *Alabama Great Southern RR.* v. *U. S.*, 340 U. S. 216 (1951); *U. S.* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 (1946).

In *Luckenbach S. S. Co.* v. *U. S.*, 122 F. Supp. 824 affirmed 347 U. S. 984 (1954), Judge Augustus N. Hand stated:

> "It is only necessary that the essential basis of the Commission's order appear in the report so that the Court can satisfy itself that the Commission has performed its function."

See also *Yemish* v. *Barber*, 232 F. 2d 939 (C. A. 9; 1956); *Jaffke* v. *Dunham*, 352 U. S. 280 (1957); *U. S.* v. *Rose*, 346 F. 2d 985 (1965).

The Examiner's Recommended Order and the Commission's decision make detailed findings of fact, both indicating that the proposed service between Arizona and California, on the one hand, and the Shayler territory, on the other, would be new, the Commission disagreeing with the Examiner only to the extent of concluding that because it is new, there should be a restriction against it, absent evidence that the new service was needed and therefore in the public interest.

Indeed, the Commission analyzes the operations of appellants before and after the issuance of temporary authority to Braswell to operate Shayler. Having made such an analysis, the Commission comes to the inevitable conclusion that approval of the transaction without restriction would create a new service and divert traffic from existing

carriers. The Commission, therefore, either by adopting the findings of its Examiner or in its own decision, indicates that it considered (1) the past operations of appellants, (2) evidence concerning a need for a new service, and (3) the adverse effect upon existing carriers which such a new service would have. All of these are mentioned in the Commission's report which, when read with those portions of the Examiner's report which have been adopted, indicate full consideration of all of the issues and complete compliance with the provisions of the Administrative Procedure Act. Indeed, as recently as December of 1966, another United States District Court has had occasion to review the law substantially as set forth immediately above and to approve imposition by the Commission of a restriction similar to the one imposed in the instant matter. See *Key et al.* v. *U. S. et al.*, 263 F. Supp. 544 (DC Ind. 1966). The analysis of the law by the District Court in Indiana in the *Key* case and the analysis of the law by the District Court in this case are identical. Both Courts review prior decisions of this Court considering precisely the same issues and come to the same conclusions.

IV. CONCLUSION.

Appellants have failed to set forth any issue substantial enough to warrant further consideration by this Court. All of the issues presented have been discussed and considered by this Court in prior decisions. Two District Courts, the one in the instant matter, and the Indiana Court, within six months of each other reviewed the issues involved and decisions of this Court relative thereto and came to the same conclusion, namely that when a new service will result from the purchase of one carrier by another, absent the showing of a public need for such service, it will not be deemed in the public interest. The law is clear and therefore the District Court's judgment and decree should be affirmed without further argument.

Respectfully submitted,

DAVID AXELROD,
ARNOLD L. BURKE,
39 South LaSalle Street,
Chicago, Illinois 60603,
Counsel on behalf of Appellees, Pacific Intermountain Express Co., DC International, Inc., Watson-Wilson Transportation System, Inc., Ringsby Truck Lines, Inc., IML Freight, Inc., Consolidated Freightways Corporation of Delaware, and Illinois-California Express, Inc.